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NO. 02-1603

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY A. BEARD, Commissioner, Pennsylvania Department of Corrections; JAMES PRICE, Superintendent of State Correctional Institution at Greene; RAYMOND J. COLLERAN, Superintendent of State Correctional Insitution at Waymart; COMMONWEALTH OF PENNSYLVANIA,
Petitioners,

v.

GEORGE E. BANKS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONERS' REPLY

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ARGUMENT IN REPLY

In his Response to the Petition for Writ of Certiorari, Banks argues that Mills v. Maryland, 486 U.S. 367 (1988), did not announce a new rule within the meaning of Teague v. Lane, 489 U.S 288 (1989). He insists, as a result, that Mills is not governed by the Teague rule of non-retroactivity, and may be applied to his older conviction. Banks also insists that the instructions in this case did indeed violate Mills, and that the Pennsylvania courts were unreasonable in holding otherwise. Petitioners disagree, as explained in the Petition for Writ of Certiorari, and for the most part will continue to rely on the arguments contained in their Petition.

Banks offers one new argument in his Response, however, which calls for a short additional reply.

Teague v. Lane does not become irrelevant if the state court rejects the claim on its merits.

Banks argues (in the alternative) that, even if Mills announced a new rule which would normally be non-retroactive, it should be applied here. He notes that the Pennsylvania Supreme Court did not address the question of retroactivity; rather, that Court considered and rejected the Mills claim on the merits. He concludes that since the *state court* did not tackle the retroactivity issue, the *federal court* should not do so either. *Response* at 7-8. This is the argument made by Judge Sloviter in her concurring opinion below; Banks urges this Court to adopt Judge Sloviter's reasoning.

There are several problems with this argument. The most obvious is that it this Court already *rejected* it last year, in this very case. See App.61-68. This Court held that federal courts sitting in habeas are obliged to address the retroactivity issue where it is properly raised by the state, even though the retroactivity question had not been considered by the state courts. The Court explained that this result was compelled by Caspari v. Bohlen, 510 U.S. 383 (1994): If the state raises the retroactivity issue, the federal habeas court *must* address it as a threshold matter, even if the state courts did not. App. 67-68.

Banks, and Judge Sloviter, employ some peculiar logic in their attempt to evade this Court's earlier directive. Last year, Banks argued that Teague is simply irrelevant if the state court did not first consider the retroactivity issue. Banks now concedes (as he must) that Teague is relevant, but argues that it is merely a rule of comity, and it imposes no retroactivity bar if the state court has considered the merits of the underlying claim. In other words, Banks reluctantly "applies" Teague to claims addressed on the merits by the state court, and finds that Teague never bars them. He thus ends up exactly where he began – arguing that there is *never* a retroactivity bar to claims addressed on the merits by the state court. But this circular approach, in addition to being at odds with Caspari, is premised on a woefully incomplete statement of Teague's purpose. The rule of non-retroactivity does not merely ensure that federal courts will never consider a constitutional theory not addressed by the state courts. The non-retroactivity principle is an independent restraint; it promotes "evenhanded justice" by ensuring that similarly situated defendants will be treated similarly. Teague, 489 U.S. at 300. Its operation also guarantees that old convictions are not continually open for reassessment and

attack. It ultimately provides closure -- not merely to state criminal process, but to victims and their families as well – and thus promotes confidence in, and respect for, the criminal justice system.

Banks and Judge Sloviter also argue (without a great deal of explanation) that there is something "unique" about the Pennsylvania Supreme Court's treatment of capital cases that fundamentally changes the appellate process, and effectively *postpones* final judgment. They focus on the state supreme court's past practice of relaxing its waiver rules in death penalty cases – a discretionary practice that was not always followed – and contend that this "relaxed waiver" effectively extended the direct appeal. Because Teague only prohibits retroactive application of new rules that are created *after* the completion of direct review, this would remove any retroactivity problem. In other words, Banks and Judge Sloviter contend that Banks' direct appeal did not really end, for purposes of the Mills/Teague analysis, until the Pennsylvania Supreme Court rejected the Mills claim on the merits in 1995.

But this makes no sense. Such a rule would render the date of final judgment entirely unpredictable and perpetually subject to re-opening. Indeed, there is always the possibility that a state court may decide to hear a claim on its merits, despite a procedural bar; if it does so, that does not destroy the finality of a concluded direct appeal. Indeed, neither this Court, nor any other Court of which the Commonwealth is aware, has ever held that the date of final judgment in a criminal case is re-set whenever the state courts hear the merits of a claim on collateral review. That is why neither Banks nor Judge Sloviter provides any authority for this "extended direct appeal" theory.

In fact, the law is the opposite. For example, in Sawyer v. Smith, 497 U.S. 227 (1990), this Court applied the Teague rule under almost identical circumstances: the state courts had considered and rejected Sawyer's Caldwell[1] claim on the merits on collateral review. There was no "extension" of Sawyer's direct appeal; the general rule against retroactivity remained the same.

Banks and Judge Sloviter stress that Pennsylvania's "relaxed waiver" is "unique," and presumably this means that the outcome here should be different from Sawyer. But they do not explain what makes Pennsylvania's system different, or why these differences matter. They seem to assume that "relaxed waiver" was mandatory and applied to all possible claims at all possible times, thus converting direct appeal of Pennsylvania death penalty cases into an endless process. But this is not so, as explained by the Pennsylvania Supreme Court in Commonwealth v. Freeman, 827 A.2d 385, 400 n.9 (Pa. 2003): "The relaxed waiver practice … was not absolute, but discretionary. This Court declined to invoke the doctrine in many instances . …"

In any event, the frequency of "relaxed waiver" does not undermine the rule against retroactivity. A state may reserve the power to re-examine older cases without postponing the date of final judgment, even if the state exercises this power *often*. The finality of a judgment is not undone by later collateral review – either under federal law, see Clay v. United States, 123 S. Ct. 1072, 1076 (2003) (for purposes of postconviction relief, finality attaches when

[1] Caldwell v. Mississippi, 472 U.S. 320 (1985).

direct review is complete), or under Pennsylvania law, Commonwealth v. Tedford, 781 A.2d 1167, 1170-71 (Pa. 2001) ("a judgment of sentence becomes final once an appellant's means of direct review of a conviction … have concluded or the time limits for seeking an appeal have expired"). The possibility of additional review does not undermine the finality of the judgment. See also Restatement (Second) of Judgments, § 13, comment note f (1980) (judgment remains final even where there exists possibility that it may later be set aside). Indeed, the Pennsylvania Supreme Court itself defined Banks's date of final judgment as the conclusion of his direct appeal, for purposes of calculating the time limit for collateral review – despite the Court's use of "relaxed waiver" to reach (and reject) several additional claims on an earlier round of collateral appeal.[2] Commonwealth v. Banks, 726 A.2d 374, 375 (Pa. 1999).

The Pennsylvania Supreme Court's past practice of relaxing its rules of waiver in capital cases was no great mystery. It was simply a tool by which the state supreme court could, in its discretion, review claims. This practice did not extend the direct appeal indefinitely, and it has no effect on retroactivity analysis.[3]

[2] Banks points out in his *Response* that, in the *Petition*, the Commonwealth mis-stated the date of his final judgment as 1986 instead of 1987 (*Response* at 3 n.1; *Petition* at 5). The Commonwealth apologizes for this inadvertent error, which does not change the Teague analysis, since Mills was decided in 1988. The *Petition* correctly sets out the dates of Banks' direct appeal at 3.

[3] This is not the first attempt by Pennsylvania capital defendants to stretch Pennsylvania's "relaxed waiver"

doctrine far beyond its limited purpose, into mandatory *de novo* review of every claim in every capital case. The doctrine of "relaxed waiver" began as a safety net, with which the state supreme court could catch egregious errors that death-sentenced defendants may not otherwise have had the opportunity to raise. Such a mechanism was necessary, in the eyes of the Court, because death penalty procedures were uncertain – the Pennsylvania death penalty statute was new, and the availability of collateral review in capital cases remained unclear. See Commonwealth v. Zettlemoyer, 454 A.2d 937, 955 n.19 (Pa. 1982), cert. denied, 461 U.S. 970 (1983).

Subsequent experience has proven that all capital prisoners in Pennsylvania have the opportunity to seek collateral relief. Even capital defendants who have refused to raise *any* claims on direct appeal are still afforded collateral review. E.g., Commonwealth v. Appel, 689 A.2d 891 (Pa. 1997). Nevertheless, the capital defense bar has consistently sought to expand "relaxed waiver" beyond any rational boundary. This led to a series of stern warnings from the Pennsylvania Supreme Court that death-sentenced prisoners are obliged to raise their claims in a timely fashion, just like all other litigants. See, e.g., Commonwealth v. Williams, 660 A.2d 1316, 1320 (Pa. 1995), cert. denied, 516 U.S. 1051 (1996); Commonwealth v. O'Donnell, 740 A.2d 198, 204 (Pa. 1999). Finally, after continued abuse of the doctrine, the Court eventually announced that "relaxed waiver" would no longer be invoked on collateral review. Commonwealth v. Albrecht, 720 A.2d 693 (Pa. 1998). Most recently, the Court held that the practice would no longer be available even on direct appeal. Freeman, 827 A.2d at 402.

Thus, the Pennsylvania Supreme Court has rejected defense attempts to convert "relaxed waiver" into a mandatory, endless appeal process. This Court should do the same, by rejecting Banks' theory that "relaxed waiver" amounted to an indefinite postponement of final judgment.

CONCLUSION

For the reasons set forth above, as well as the reasons given in their initial brief, petitioners respectfully request that this Court grant the Petition for Writ of *Certiorari*.

Respectfully submitted,

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